No. 2936

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES STEEL PRODUCTS COMPANY,
a Corporation
PLAINTIFF IN ERROR

VS.

POOLE-DEAN COMPANY, a Corporation
DEFENDANT IN ERROR

Brief on Writ of Error for Plaintiff in Error

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Plaintiff in Error,

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STATEMENT

In 1912, the Grand Trunk Pacific Railway Company sent out specifications and invited bids for the construction of a proposed terminal at Prince Rupert, British Columbia. The site selected was a deep bay, ringed with hills, the harbor of a town (Prince Rupert), which the Railway intended developing as its terminus although its line was not yet built. The program proposed included a large dock system, power house, machine shop, boiler and blacksmith shop combined, cold storage shed, a large ship shed of peculiar design, and a dry dock in three sections floating on pontoons.

"Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific Buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection."

"As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert."

"Our formal contract with you for the erection will be drawn up as soon as conditions permit."

(Defendant's Exhibit 2—Poole-Dean to Company, November 7, 1913.)

"It is our understanding we are to erect, rivet and paint two coats on main buildings for $18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for $18.00 per ton of 2000 pounds, all material to be delivered to us on dock at building site."

(Defendant's Exhibit 3—Company to Poole-Dean, November 11, 1913.)

"Your understanding is, in accordance with ours that: you are to haul, erect and rivet the steel for the buildings, for Eighteen Dollars ($18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars ($18.00) per net ton of 2000 pounds."

"All steel work to delivered to you on dock at Prince Rupert, B. C."

All of these letters were written and received before Poole-Dean began to make any arrangements to do any work.

It will be seen that these letters constitute: first, a proposal by Poole-Dean, dated November 16, 1912; second, a statement by the Company that Poole-Dean would receive the order, dated March 24, 1913; third, a recapitulation by Poole-Dean of the terms of their contract, dated November 7, 1913; and fourth, a confirmation by the Company, dated November 11, 1913, of Poole-Dean's recapitulation. There is no dispute as to the accuracy of these letters, nor as to their contents.

About the 18th or 19th of November, 1913, Poole, who had in the meantime received the detail sheets governing the erection work, in company with Dean, took them up to Mr. Overmire's office and complained that they showed more fabricating and

assembling work to be done in the field than he had anticipated. The following day Dean, then associated with Poole in the management of Poole-Dean, left for Prince Rupert and work was begun by Poole-Dean at the site upon Dean's arrival there.

Besides the complaints from Poole-Dean concerning the degree to which the steel had been fabricated before shipment, complaints were made to the Company from time to time of difficulties and delays experienced owing to the congested condition of the site and the consequent lack of storage space for the steel. During September and October, 1914, Poole-Dean, claiming that the erecting work had reached a point where it could not continue until certain pontoons for the floating dry dock should be delivered, shut down operations and shipped away a number of workmen who had to be brought back or replaced when the work was resumed in November, 1914. Subsequently certain changes in the work were ordered by the Railway's engineer, which necessitated the doing of extra work by Poole-Dean during April, May, June, and July, 1915. It is undisputed that Poole-Dean from time to time billed the Railway directly for the cost of this extra work, and that these bills were approved by the Railway and the amount thereof either paid to or credited upon certain indebtedness owed by Poole-Dean to the Railway.

Claims were presented to the Company by Poole-Dean purporting to cover the cost of the fabricating and assembling which Poole-Dean asserted should

have been done in the shop, and other claims for expenses alleged to have been incurred by Poole-Dean owing to the lack of storage space and the shut-down in 1914. Refusal by the Company to entertain these claims resulted in the present action, in which Poole-Dean included a claim for the extra work already credited by the Railway.

The facts out of which arises the disagreement between the parties are largely undisputed. There is, as has been stated, no question as to what work Poole-Dean's contract with the Company called for their doing. The work was completed satisfactorily; the steel was delivered by the Company according to agreement. It is admitted that the congested condition of the building site was due solely to the simultaneous carrying on by the Railway of other construction work in addition to that on which Poole-Dean was engaged; the delay in furnishing the pontoons is also admitted to have been solely the fault of the Railway, which was building them, as, under its own specifications, it was to furnish them itself; and it is not denied that Poole-Dean received credit from the Railway for the extra work. The underlying grounds of the dispute, when reduced to their lowest terms, involve, therefore, the following questions:

1. Was any agreement made by Mr. Overmire for the Company, not contained in the letters constituting the written contract between Poole-Dean and the Company, as to the degree to which the steel

would be fabricated and assembled for the buildings other than the dry dock before delivery to Poole-Dean; and, if so, what was this agreement and was it violated by the Company?

2. Is the Company liable for the Railway's failure to deliver pontoons at any time, or for the consequent damages and expenses which resulted therefrom?

3. Is the Company liable for the congested condition of the docks and building site and the consequent lack of space for storing the steel?

4. Is the Company liable for the cost of the extra work ordered by the Railway, billed by Poole-Dean to the Railway, and credited by the Railway to Poole-Dean?

SPECIFICATIONS OF ERROR

Assignments of error are found on pages 36 to 53 of the transcript. We shall take these up in order.

I.

A letter dated November 10, 1915, from Poole-Dean to the Company marked Plaintiff's Exhibit "I" is found in the transcript on page 75. This letter refers to a telephone conversation regarding the charge for rehandling the dry dock material and explains that the cost of handling and sorting this material was due to the crowded condition of the dock. It further states that in making its proposal Poole-Dean estimated cost of handling and

sorting at 90 cents a ton, aggregating $2213.10 and showing the additional cost over estimate of $3216.22, billing to the Company $2459.00 of this expense and absorbing the remainder, $757.22. The specific objection made to this evidence was that it allowed the plaintiff to base the excess cost upon its estimate made prior to the letting of the contract. It is also open to the objection that it appears from this letter that the handling and sorting of the material was a part of the duty of Poole-Dean, as is shown by the contract in writing, and therefore it tends to contradict the written contract.

II.

The second error is predicated upon the introduction in evidence of Plaintiff's Exhibit "L," a letter from the Company to Poole-Dean dated December 2, 1913. This letter was written by C. W. Steele as contracting agent. The substance of the letter was to authorize Poole-Dean to receive material and states that extra charges on this account should be arranged between Poole-Dean and Overmire. This material was not material for the dry docks. Furthermore, the letter relates only to the receipt of material from the ship's tackles, not to handling and sorting. There was no claim in the complaint for any damages on this account, and therefore this letter did not concern any of the issues.

III.

The third specification of error relates to the question propounded to C. O. Dean (transcript, page 114). This question was directed to the estimate made by Poole-Dean of the cost of handling the steel, assuming that there was sufficient space on the dock. The objection was that the question was not material, as it could make no difference what such estimate was. The answer of the witness was that the estimate was 90 cents a ton providing he had plenty of space.

IV.

The next assignment of error is directed to the question propounded to the witness Charles O. Dean, also directed to this estimate, and the witness answered that 90 cents was a reasonable price and that there was a profit in it at 90 cents a ton provided they had space; that it cost about $1.38 extra per ton to move the steel because of the congested condition of the yards, and that is how he computed the amount at $2459.00. This evidence is clearly in conflict with the contract and it was also based upon the estimate of the cost made by Poole-Dean at the time it submitted its bid.

V.

The plaintiff had offered in evidence certain letters written by Overmire to Stratton, Exhibits "S," "T," "U," "V," "W" and "X" (transcript, pages

298 to 319), and was asked by the counsel for plaintiff how he explained the inconsistent terms in these letters. This question was objected to upon the ground that the letters and everything which the witness had said concerning the same contained merely representations made by the Railway engineers but no agreement or promise in regard to the site, and that the question would lead the jury to believe that there was an agreement. In overruling the objection the *court stated that the jury should be the judges as to what constituted the agreement and would have to take into consideration the correspondence between the parties in regard to the matter and what was said and done between the parties.* While this question was objectionable inasmuch as it indicates that there was some agreement in regard to the site made between the parties to the controversy, which was not the fact, the chief error is that the court in passing on the matter ruled that this correspondence, not between the parties but between Overmire and his own Company, and dated long after the contract was made, was competent and should be taken into consideration to determine what constituted the agreement, and that what was said and done between the parties as well as the writings should be taken into consideration by the jury, and that the jury were to be judges of what constituted the agreement, thus submitting this question of law to the determination of the jury and submitting moreover, in order to determine what a contract was, matters which

occurred between the parties long after the contract was made and while the contract was being performed.

VI.

The sixth assignment of error is the refusal of the court to instruct the jury to return a verdict for the defendant. The contention of the Company is that the contract is contained in the several letters beginning November 16, 1912, and ending with letter of November 11, 1913. That the evidence on the part of the plaintiff showed no breach on the part of the defendant in this contract and therefore a verdict for the defendant should have been directed.

VII.

Assignment VII is directed to the error of the court in refusing to charge the jury to return a verdict for the defendant upon the first cause of action. This is based upon the same contention made in regard to assignment of error VI, *supra*, and it is unnecessary to repeat the same.

VIII.

Assignment of error VIII is directed to the refusal of the court to instruct the jury to return a verdict for the defendant upon the second cause of action. The second cause of action was for alleged failure on the part of the Company to furnish space for sorting and handling the steel for the dry

dock wings. The contract clearly specifies whose duty it should be to handle the steel, and nowhere in the contract is anything said in regard to space being furnished by the defendant. The parties clearly understood that the steel should be delivered on the dock. The defendant, therefore, is entitled to a directed charge upon this cause of action.

IX.

The third alleged breach of contract and cause of action is really the same as the second alleged breach and cause of action containing only another element of damage for the same alleged breach. The failure to direct a verdict upon this therefore is open to the same criticism as assignment numbered VIII.

X.

Assignment X is based upon the refusal of the court to direct a verdict for defendant upon the fourth alleged breach of contract. The breach in this case is claimed to be due to delays in furnishing the pontoons, an obligation resting not upon the defendant but upon the Railway. There was no evidence showing any obligation upon the defendant to furnish the pontoons. Indeed the plaintiff shows that he understood from the specifications themselves that the pontoons were to be furnished by the Railway. The contract does not provide that the defendants should furnish pontoons. We there-

fore submit that upon this cause of action the defendant was entitled to a directed verdict.

XI.

Assignment XI is directed to the refusal of the court to give the following instruction (transcript, pages 41-42):

> "This controversy grows out of an agreement between defendant and the Grand Trunk Pacific Railway in which defendant agreed to furnish all structural steel for the erection of certain buildings for said Railway at Prince Rupert, British Columbia, and to erect said steel all according to certain plans and specifications in writing. These plans and specifications thereby became a part of the defendant's contract. The defendant reserved the right to sublet the erection of the steel and did sublet this part of its contract to the plaintiff. Thereby the contract between the plaintiff and defendant became in all respects subject to the plans and specifications according to which the original contract between the defendant and the Railway Company was awarded, and the plaintiff is conclusively presumed to know and is bound by everything contained in the plans and specifications which relate to the erection of the steel."

A part of this charge was given by the court (transcript, pages 360-361), but in its charge the

court stated that the defendant was to "fabricate the steel on the ground as it came from the mill" and to erect the steel into the buildings. Under the contract the defendant was not to fabricate the steel on the ground as it came from the mill. It was to fabricate the steel and to erect the same into the buildings.

XII.

The twelfth assignment of error is directed to the refusal to give the charge found on pages 42 to 44 of the transcript, as follows:

> "There are four distinct causes of action joined by plaintiff in this case (although five are stated in the complaint), growing out of four alleged breaches of contract on the part of defendant. First (numbered I in the complaint) plaintiff alleges that defendant agreed to deliver the steel completely fabricated, but failed to do so, and later agreed to have plaintiff charge defendant for the necessary fabrication, but failed to pay such charge. This alleged breach of the contract set forth in the first cause of action does relate to the steel delivered for the dry dock. It is admitted that the steel for the dry dock was fabricated according to the contract. This first cause of action, therefore, in which plaintiff claims damages in the sum of $3330.69 is limited to the fabrication of the steel for the foundry, cold storage, blacksmith, boiler and machine shop

building and the ship shed. The second alleged breach of contract is set forth in the complaint in the two causes of action numbered therein II and III. These two causes of action should be considered together, as they are claims for damages for alleged delays on the part of the defendant in furnishing pontoons for the dry dock upon which the steel was to be erected. For these alleged delays plaintiff claims damages in the sum of $2123.64 as the rental value of its plant for the period extending from September 1, 1914, to November 4, 1914, and also claims damages in the sum of $918.00 for moneys which it claims it was compelled to expend in paying transportation for employees to and from Vancouver, B. C. There is no claim that the steel for all the buildings, except the dry dock, was not furnished in time. The next alleged breach of the contract contained in the cause of action numbered IV in the complaint is that the defendant agreed to furnish storage space for the steel for the dry dock, but failed to do so. This cause of action, therefore, is limited to the steel for the dry dock and it is admitted that the plaintiff has no complaint for lack of space furnished for the steel for all other buildings. The cause of action numbered V in the complaint is based not upon the original contract but upon the new contract not covered by the original contract at all. In this the plaintiff claims that the de-

fendant ordered some work done, which the plaintiff did; that this work amounted to the sum of $400.70 and that the defendant has refused to pay for the same."

We submit that this charge states clearly what were the issues between the parties. A part of this charge was given in its own language to the court but nowhere does the court point out in its charge that the plaintiff had no complaint of lack of space for the steel for any building except the dry dock, and nowhere does the court define the issues to the jury.

XIII.

The thirteenth assignment of error relates to the refusal to give the following charge (transcript, pages 44-45):

"There is no question between the parties that the pontoons upon which the dry dock were to be erected should be furnished by the Grand Trunk Pacific Railway and not by the defendant, and the defendant owed to the plaintiff no duty to furnish such pontoons at any particular time, but only when the same were furnished to it, the defendant, by the Grand Trunk Pacific Railway. The evidence shows, without contradiction, that any delay in furnishing the pontoons was not due to the defendant but to the Grand Trunk Pacific Railway Company. I therefore charge you that

> the plaintiff cannot recover for the alleged delays in furnishing the pontoons and your verdict upon the second and third causes of action must, therefore, be for the defendant."

This charge clearly defines one of the issues presented by the pleadings and we contended that it was the duty of the court to construe and tell the jury what was the contract, and also that it was the duty of the court to direct the jury that inasmuch as the pontoons were not to be furnished by the defendant the plaintiff could not recover anything on account of the failure of the defendant to furnish the same.

XIV.

The fourteenth assignment of error is directed to the refusal of the court to give the following instruction (transcript, page 45):

> "In regard to the fabrication of the steel for the buildings other than the dry dock, I charge you that the parties did agree that the steel for these buildings should be fabricated by the defendant at the shops; that is to say, should be assembled and riveted together at the shops to the same extent to which similar steel for similar work when transported by ship is ordinarily or usually fabricated; that is to say, usually assembled and riveted. This is a question of fact to be determined by you

upon the evidence submitted. The burden of proof upon this question is upon the plaintiff."

The contract being in writing it was necessary for the court to charge the jury what was the contract, but the court having ruled that the contract was not all in writing it then became the duty of the court to charge the jury in regard to what was meant by the terms fabrication at the shops, or, in order to bring the matter within the terms of the contract, to direct the jury what was meant by structural steel or steel for the buildings and dry dock.

XV.

Assignment of error XV is directed to the charge requested and refused found on page 46 of the transcript, as follows:

"A letter from the plaintiff to the defendant dated November 7, 1913, and the answer to the same dated November 11, 1913, both of which are in evidence, define the extent to which the steel should be fabricated, assembled and riveted. I charge you, therefore, that it was the duty of the defendant to fabricate, assemble and rivet steel to the same extent to which similar steel for use in similar buildings is usually fabricated, assembled and riveted when the same is to be transported by ship for export. Whether the steel was so fabricated, assembled and riveted is a question of fact which you will determine from the evidence. You will under-

> stand, however, that there is no question between the parties that the steel for the dry dock was fabricated, assembled and riveted in all respects as required by the contract between the parties."

We submit that this charge should have been given not only because of the fact the contract was in writing but also because there was no claim that the steel for the dry dock was not fabricated, assembled and riveted in all respects as agreed.

XVI.

Assignment XVI is based upon the refusal of the court to give the jury the following instruction (transcript, pages 46-47):

> "The contract between the parties provides that the steel shall be delivered on the dock. It does not provide that any space should be furnished by the defendant for storing, assorting, or handling the steel. The plaintiff was under the contract to receive steel on the dock and to do all things necessary after it was received to erect the building according to the plans and specifications. This included the handling and assorting of the steel wherever necessary. I charge you, therefore, that there was no obligation on the part of the defendant to furnish space for this purpose and that you will, therefore, find a verdict for the defendant upon the fourth cause of action."

There was no question that the steel under the contract was to be delivered on the dock. There was no question that the contract provided that Poole-Dean should haul, erect and rivet the steel. It therefore was the duty of the court to charge the jury in regard to the obligation of the plaintiff in this particular and to have directed a verdict for the defendant as requested.

XVII.

Assignment of error XVII is directed to the refusal of the court to give the following charge (transcript, pages 47-48):

> "The fourth cause of action, as I have stated, grows out of a new and independent contract. It is admitted that the plaintiff did the work and that the value of this work was $400.70. It is contended on the part of the defendant that the orders to do this work were issued by the Grand Trunk Pacific Railway and were merely transmitted by the defendant to the plaintiff. If you find from the evidence that this work was ordered by the Grand Trunk Pacific Railway and the orders merely transmitted to the plaintiff by the defendant, then the defendant will not be liable to plaintiff for the value of this work. This is a question of fact to be determined by you from the evidence and the burden of proving that the work was performed for the defendant is upon the plaintiff."

The Company thinks that there is no question in regard to this matter. The extra work was not covered by any contract between the plaintiff and the defendant. The work was outside of the Company's contract with the Railway Company. Poole-Dean Company had assumed to do all the work of erecting and it had been understood that this part of the work the Company should sublet. Therefore in so far as this extra work is concerned Poole-Dean Company did this work not for the Company but for the Railway.

XVIII.

Assignment of error XVIII is directed to the refusal to give the charge found on pages 48 and 49 of the transcript, as follows:

> "In regard to the extra work for which the plaintiff claims $400.70, the defendant alleges in its answer that plaintiff presented a claim for this work in said sum to the Grand Trunk Pacific Railway Company, that the claim was allowed by the Grand Trunk Pacific Railway Company and that the defendant was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding $400.70 and the amount of this bill was allowed to the plaintiff as a credit upon its indebtedness to the Grand Trunk Pacific Railway Company. If you find from the evidence that the plaintiff did present a claim for this sum to the Grand Trunk Pacific Rail-

way Company and this claim was allowed, that at the time that it was allowed the plaintiff was indebted to the Grand Trunk Pacific Railway Company in a sum exceeding $400.70 and that this sum was allowed to the plaintiff as a credit upon such indebtedness, then I charge you that the plaintiff has received compensation for this extra work in this sum and that it cannot recover from the defendant."

What we have said in regard to assignment XVII applies with equal force to assignment XVIII. In addition to this there was no controversy really that the plaintiff did present a claim for this sum to the Railway Company; that the claim was allowed; that at the time it was allowed the plaintiff was indebted to the Railway Company in a sum exceeding the amount of this claim and that the amount of this claim was allowed as a credit upon such indebtedness.

XIX.

Assignment of error XIX is directed to the refusal to charge (transcript, pages 49 and 50), which requested charge is as follows:

"You are instructed that it was the duty of the Railway, and not of defendant, to furnish pontoons for the dry dock wings, and that plaintiff was not bound to begin erection work on said wings until three pontoons had been furnished plaintiff by the Railway. You are also

instructed that plaintiff was bound to do all its work upon said wings under the direct supervision of the Railway and was bound to carry out the instructions of the Railway concerning such work. Defendant had no right to give instructions or to exercise supervision over such work except as and when acting on behalf of the Railway. Therefore, if you find that plaintiff was delayed in erecting said wings by lack of sufficient pontoons, or if you find that plaintiff was instructed to begin erecting said wings before three pontoons had been furnished to plaintiff, in either case your finding will not show any breach of legal duty on the part of defendant, and your verdict upon the second alleged breach of contract and cause of action must be for defendant."

The court did instruct the jury (transcript, pages 360-361) that plans and specifications were to control the operation of the work of Poole-Dean as well as the work of the Company. The specifications were in evidence and in writing and it was therefore the duty of the court to instruct the jury in regard to that part of these specifications which were binding upon Poole-Dean. There is no controversy that the obligation was upon the Railway to furnish the pontoons and that the delay was caused by this failure on the part of the Railway. Therefore it would seem that the instruction requested should have been given.

XX.

The twentieth assignment of error is in the charge of the court found on pages 50 to 52 of the transcript, which is as follows:

"Now, to these three causes of action, the second, third, and fourth, the defendant interposes a defense to this effect: That 'said specifications provided, and said contract between plaintiff and defendant was made with the express understanding, that the construction operations on said main buildings and wing of dry dock should at all times be under the full control and management of the Grand Trunk Pacific Railway and its officers and agents.' And it is further alleged that, 'It was mutually understood and agreed by and between plaintiff and defendant at the times said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with the express understanding, that the pontoons for the wing of the dry dock should be furnished and provided by Grand Trunk Pacific Railway and not by defendant, and said pontoons are the pontoons mentioned in plaintiff's said amended complaint; and it was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made with

the express understanding, that space for storing, assorting, and handling said steel on the dock of Grand Trunk Pacific Railway at Prince Rupert, British Columbia, should be furnished and provided by Grand Trunk Pacific Railway, and not by defendant.' .

"So the defense, then, to these three causes of action is based upon the alleged fact that the plaintiff, and that it was so understood by and between the plaintiff and defendant, should look to the Grand Trunk Pacific Railway Company for these rights and privileges, and that it was not to look to the defendant company; that is to say, that the plaintiff was to look to the Grand Trunk Pacific Railway Company for the furnishing of this space that is complained about, and for the time of the beginning of the work, and for the other things that are alleged in these three causes of action, and not to the defendant company. This, of course, is based upon the fact that the Grand Trunk Pacific Railway Company was making these improvements, and that the contract of the defendant company was made with the Grand Trunk Pacific Railway Company to furnish the materials and to erect the steel in the buildings. And I might say this, in this relation, however: That if it had been the defendant company who was erecting this steel into the buildings, it might be inquired whether or not it was not the duty of the Grand Trunk Pacific Railway Company

to furnish adequate space for handling the steel. If that was the case, then the inquiry may be extended—a sub-contract having been let to the plaintiff company to erect this steel and put it into the buildings, whether or not the defendant company did not assume the obligation that would have rested upon the Grand Trunk Pacific Railway Company in the first instance of providing adequate space for the carrying on of the work in riveting this steel and in putting it into the buildings. I submit that, gentlemen of the Jury, for your consideration, along with the alleged contract and the denials thereof, for determination as to whose duty it was to furnish space—whether or not that was a duty devolving upon the defendant company, or whether or not the plaintiff was to look to the Railway Company alone for furnishing that space, and not to the defendant."

This charge recites the allegations of the answer and then the court charges the jury that it is for its consideration to determine whose duty it was to furnish the space and whether or not it was not the duty of the defendant to furnish the pontoons or whether or not the defendant did not assume the obligation which would have rested upon the Railway Company in the first instance.

ARGUMENT

This action is based upon a contract or contracts and therefore it will be necessary to first ascertain what was the contract or contracts.

CONTRACT.

The contract was made between Otho Poole, representative of the plaintiff, and C. C. Overmire, representative of the defendant. It appears from the testimony of Poole (transcript, page 57) that the matter was first taken up between himself and Overmire in September, 1912; that Overmire called him up to the office and told him that this job was coming up up North and that they would have to *go to Seattle to get plans to figure the job*, and that after they got to Seattle *they found there were no plans there* and they *went on to Prince Rupert* together and *got the plans there*, went over the thing and discussed the whole matter, shipping site, etc., while they were there (transcript, page 57). He further testified that at Prince Rupert they saw Mr. Pillsbury, representative of Mr. Donnelly, engineer in charge of the work, and that Overmire asked Pillsbury about space for handling material and Pillsbury assured him that he would have all the space that he needed. This testimony is confirmed by Overmire (transcript, pages 267 to 271). From this evidence it appears that the Grand Trunk Pacific Railway prepared plans and specifications and advertised for bids for certain work to be done at Prince Rupert including all the work the sub-

ject-matter of this contract, except that portion embraced under Cause of Action No. V (extra work). The Company, intending to bid upon this work, wrote to Overmire, its agent in Portland, to get in communication with some contractors and ascertain at what price he could procure the erection of the steel for the buildings at Prince Rupert, mentioned in the complaint. Overmire turned to Poole and they together went to Prince Rupert and remained together until after they returned to Seattle, and during this time Poole-Dean made verbally an offer to Overmire to do this work, which offer is the subject-matter of the contract afterward entered into between the parties. This offer was made before the Company made any bid or proposal to the Railway and the offer bid by Poole-Dean to Overmire was made a part of the bid of the Company, or included in the Company's bid to the Railway Company. *The parties, therefore, may be said to be joint contractors to the Railway, the one to fabricate and furnish the steel and the other to erect the steel when delivered upon the ground.* It was some time, of course, after this when the contract was awarded to the Company, exactly when it was awarded is not shown by the record. Meanwhile, however, Poole-Dean wrote to the Company a proposal in writing dated November 16, 1912, which proposal is Plaintiff's Exhibit "A," found on transcript pages 55 and 56, and is as follows:

"Portland, Oregon, November Sixteenth, 1912.

U. S. Steel Products Co.,
Selling Building,
Portland, Ore.

Gentlemen:

We propose to furnish all necessary labor and equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of EIGHTEEN ($18.00) DOLLARS per ton of 2000 pounds. Material to be delivered on docks at building sites.

Your very truly,
Poole-Dean Company,
OP/AWH Per Otho Poole."

Poole testifies (transcript, page 56) that this proposal was accepted verbally; that Overmire told him "if we get the job you will get it" and that he kept in touch with Overmire right along after that, and some time afterward Overmire said to him: "Well, we have got that job up North." It does appear that an acceptance of this proposal was made by the Company in its letter, Plaintiff's Exhibit "G" (transcript, pages 68-69), but in view of what occurred in 1913 and prior to the time that anything was done under the contract it is unimportant whether this proposition of November 16, 1912. was or was not formally accepted. It appears from the evidence of Dean (transcript, page 115)

that he left Portland about the 19th or 20th of November, 1913; that he obtained his employees in Vancouver on his way up (transcript, page 113); that the shop detail plans were sent to their office in Portland by the Company before he left Portland (transcript, page 109). It is shown by Defendant's Exhibit 2, a letter which Poole-Dean wrote and sent to the Company, that before anything was done in pursuance of this contract Poole-Dean wrote a letter (transcript, page 92) as follows:

"Portland, Oregon, November 7th, 1913.

U. S. Steel Products Co., City.

Gentlemen:

In looking through our files we find that we have misplaced copies of our original proposals on the main buildings and wings of the dry dock at Prince Rupert.

It is our understanding we are to erect, rivet and paint two coats on main buildings for $18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for $18.00 per ton of 2000 pounds, all material to be delivered to us on dock at building site.

If the above is in accordance with your understanding we will ask that you confirm same at your earliest convenience in order that our records may be complete. Thanking you in advance, we are

Yours very truly,

Poole-Dean Company,

OP/AWH Per Otho Poole."

It is uncontradicted that on November 11, 1913, Poole-Dean received from the Company a letter (transcript, pages 93 and 94) as follows:

"Portland, Oregon, November 11, 1913.

Subject: Prince Rupert Buildings.

Messrs. Poole-Dean Co.,

Portland, Oregon.

Gentlemen:

We have your letter of the 7th instant which states that you have misplaced copies of your original proposal on the buildings and wings of the dry dock on the above subject.

Your understanding is, in accordance with ours, that: you are to haul, erect and rivet the steel for the buildings, for Eighteen Dollars ($18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars ($18.00) per net ton of 2000 pounds.

All steel work to be delivered to you on dock at Prince Rupert, B. C.

Very truly yours,

Bridge and Structural Department,

C. C. Overmire,

Contracting Manager.

By Frank E. Fey,

Contracting Agent.

F-C

Cy to W. H. Stratton."

These two letters constitute a proposal and an acceptance, and soon after these letters were exchanged between the parties Poole-Dean began to make arrangements to carry out the contract. These two letters constitute the contract between the parties, the contract upon which every cause of action is based except the cause of action for extra work, amounting to $400.70.

The rule of law is that when a contract is reduced to writing no parol evidence can be offered or received which shall contradict the writing, but the law conclusively presumes that the writing contains the contract. (17 Cyc., pages 596 and following.) The rule goes even farther than this statement, for it is uniformly held that where the written instrument is free from ambiguity and is in itself susceptible of a clear and sensible construction, parol evidence is not admissible to explain its meaning or to determine the construction of the writing. All that is necessary to show in order to exclude parol evidence of the contract is to show a complete written contract between the parties, a writing of such a nature as to show that it was intended to evidence the agreement between the parties with reference to the subject-matter. It is not necessary that the writing should be in one paper or in any particular form; indeed it is not necessary that the contract should be reduced to writing before it is partly performed, for if reduced to writing after it has been partly performed the parol agreement has been

merged in the written one. This is not simply a rule of evidence, *it is a rule of law.*

So in *Pitcairn v. Hiss*, 125 Fed. Rep. 110, the Circuit Court of Appeals for the third circuit said:

> "According to the modern and better view, the rule which prohibits the modification of a written contract by parol is a rule not of evidence but of substantive law."

The parol evidence in the case cited was admitted without objection, and based upon this evidence instructions were requested by the defendant. These instructions were refused, the trial court saying:

> "The contract in suit having been reduced to writing in the shape of written propositions by the plaintiff and written acceptances by the defendant, signed by the parties or their representatives respectively, such written contracts cannot be contradicted or varied by evidence of an oral agreement before or at the time of the execution of the contracts."

It was claimed that inasmuch as the evidence was before the jury without objection it could not be withdrawn from their consideration, but the Circuit Court of Appeals says, page 114:

> "Notwithstanding its admission it was still for the court to declare what as a matter of law

was the contract between the parties, whether it was to be confined to that which was expressed in the writings or could be extended to the verbal assurances alleged to have been given outside of them."

It was the duty of the court, therefore, to construe these several papers and declare from this construction of these several papers what was the contract between the parties and this the court could not submit to the jury for its determination. It will be noted from Defendant's Exhibit 2 that the object of this letter was to "confirm the understanding which Poole-Dean had (of the contract between it and the Company) in order that its records might be complete." In other words, Poole-Dean stated its proposition as it understood it and requested the Company to confirm its understanding. The Company on November 11, 1914, by Defendant's Exhibit 3 (transcript, pp. 93-94) does confirm this, and it was after the receipt of this letter and without any objection to it, that Poole-Dean entered upon the execution of this contract. In the offer of November 16, 1912 (Plaintiff's Exhibit "A"), Poole-Dean proposed to furnish all necessary labor and equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert for $18.00 per ton of 2000 pounds, material to be delivered at the building sites. In their confirmatory letter of November 7, 1913, Poole-Dean

do not say *steel*, and instead of the word *buildings* speak of main buildings and particularly mentioned dry dock, material to be delivered on dock at building site, and this is confirmed particularly by the Company. The only difference between the acceptance and the proposal and confirmation is, that the acceptance more particularly defines the work to be done, combining the original proposal and confirmatory proposal and more particularly states the place of delivery.

Appellant submits that under the law no parol evidence could be introduced which would tend to vary or contradict these writings. The only parol evidence which could be introduced would be for the purpose of explaining the terms used in the contract. For example, it admits that parol evidence was proper to define the term *buildings* unless the term *buildings* was defined in some other writing referred to in the contract. The appellant contends that the term *buildings* is defined in the specifications, and that the specifications are made a part of this contract.

These writings define the place where the steel is to be delivered as the dock at Prince Rupert, B. C. The evidence shows that there was only one dock at Prince Rupert, B. C., and shows that the material was delivered on this dock. In this there is no controversy. It is possible that the term *steel* for the buildings (the term *structural steel* is used in Exhibit "A," transcript, page 55) might be susceptible of explanation by parol evidence, but this

cannot be the case as the steel is all defined in the specifications.

The four exhibits, "A" (transcript, page 55), "G" (transcript, page 68), 2 (transcript, page 92) and 3 (transcript, page 93) clearly define what each party undertook to do. Under these papers the Company agreed to deliver the steel for the buildings on the dock at Prince Rupert, B. C. It did not undertake to do anything more. It is contended that the steel was to be delivered completely fabricated; but the contract does not so provide. In the absence of any provision in the contract as to the degree of fabrication the presumption will be that the term *steel* or *structural steel* should be construed or taken to mean that the steel should be of such dimensions as the plans and specifications provide. It is conceded that it was fabricated to this extent and to a greater extent, in that many of the parts were riveted. The Company also was to pay for the work which Poole-Dean agreed to do, $18.00 per ton of 2000 pounds.

Turning now to the obligation on the part of Poole-Dean in proposal Exhibit "A" (transcript, page 55) Poole-Dean offered to furnish all necessary labor and equipment to erect, *rivet* and paint the structural steel to be used in buildings and smoke stack. Exhibit "G" does not state anything in regard to this matter. Not content with the situation, with what Poole termed a verbal acceptance of the proposal of November 16, 1912, Poole wrote the letter of November 7, 1913 (transcript, page

92). The object of writing this letter is stated in the letter itself and his understanding of the contract which he claimed was then in force is set forth in this letter. In this letter he mentions the main buildings and wings of the dry dock at Prince Rupert. In this letter he states that "we are to erect, *rivet* and paint two coats on main buildings * * * on wings of dry dock we are to erect, *rivet* and caulk * * * all *material to be delivered to us on dock* at building site." Therefore Poole-Dean contemplated that it should do the *riveting*. Their proposal so states and the letter asking a confirmation of this proposal again so states. As the material was to be delivered on the dock it is clear that from the time of its delivery on the dock whatever was required in order to put it in the buildings according to the plans and specifications was to be done by Poole-Dean, so that taking this proposal by its four corners it is plain that if material came of the dimensions called for by the plans and specifications and was duly delivered the Company fully complied with its contract. The acceptance makes this even more certain. It provides that Poole-Dean is to "*haul*, erect and *rivet* the steel for the buildings, including furnishing and applying two coats of paint as per specifications," also to "*haul*, erect, *rivet* and caulk the steel work for the wings of the dry dock." There is no ambiguity in regard to what there was to be done, and therefore no parol evidence was proper and the question as to what was the contract sued on was a question for the court

and not for the jury. In this connection note that in the complaint (paragraph III, page 6, again paragraph III, page 9, again paragraph III, page 11, again paragraph III, page 13) Poole-Dean alleged but one contract, the contract made, as stated, about September, 1912. No modification of this contract was alleged. It is this contract which it is seeking to enforce and this contract, prior to doing anything in pursuance thereof, Poole-Dean Company insisted should be reduced to writing and signed by the parties, and this was done.

Therefore the appellant insists that it was error on the part of the trial court in refusing to construe the contract and in refusing to charge the jury as to what was the contract between the parties. This error is inherent in the refusal of the court to give the charge or instruction presented on page 41 of the transcript numbered XI. It is inherent also in the refusal to give the charge found on pages 42 to 44 of the transcript and numbered XII. It is also inherent in the refusal to give the charge requested by the appellant and numbered XIII in the assignments of error, transcript, page 44. It also is inherent in the charge requested by the appellant and found on pages 45 and 46 of the transcript, assignment of error XV. It applies with equal force to the charge requested and refused found on pages 46 and 47, assignment of error numbered XVI. It is also involved in the charge requested and refused found on pages 49 and 50 of the transcript, assignment of error numbered XIX.

The same error taints the charge given by the court found on pages 50 to 52 of the transcript and numbered assignment of error XX. The attention of the court was more particularly directed again to this matter by the application of the defendant for instructed verdicts, assignments of error VI, VII, VIII, IX and X. This is particularly true in regard to assignment of error VIII wherein the court refused to charge the jury to return a verdict for the defendant upon the second cause of action, and in assignment of error numbered IX wherein the court refused to instruct the jury to return a verdict for the defendant upon the third alleged breach of contract and cause of action, and also in the refusal of the court to charge the jury to return a verdict for the defendant upon the fourth alleged breach of contract and cause of action, assignment of error X. Cause of action II alleges a breach on the part of the defendant of the contract in failing to furnish space for assorting and assembling the steel. Under the proposal or proposals and acceptance it is clear that Poole-Dean was to take the steel on the dock and that it was to do everything which was necessary from the time the steel was delivered upon the dock until the steel was erected in place according to the plans and specifications. It was to *haul*, erect and *rivet*. There is no complaint that the steel was not delivered upon the dock and there was no obligation contained in the contract that the Company was to secure space on the dock for assorting and assembling the steel. It is not claimed

that the contract was modified after it was made. A proposal in writing even by telegram and an acceptance in writing even by telegram constitute a written contract, and parties are conclusively presumed when once they have reduced their contract to writing to include in the writing all of the contract. Citation of authority upon this proposition might be made but we deem it unnecessary, as the proposition is practically elementary and as the Circuit Court of Appeals has said in the case of *Pitcairn v. Hiss, supra*, this is not a rule of evidence but a rule of substantive law. Whatever was said between the parties before or at the time the contract was so reduced to writing is conclusively merged in the written contract. Whatever was said between the parties after the written contract was executed can only be used for the purpose of showing a modification of the contract, and this is not pleaded or claimed. Again, the third cause of action is for an alleged breach of the contract in that it is claimed that the defendant should not order the plaintiff to begin work on the job until the plaintiff could, when starting, continuously keep at work until the completion of the job. There is not one single syllable in the proposal and acceptance which constitutes the written contract between the parties which tends to show that any agreement of this character was made, and if it was talked of before the contract was entered into or at the time that the contract was entered into as alleged (transcript, page 9) it was not made a part of the contract and

therefore it must be conclusively presumed was not a part of the contract. In so far as the third cause of action is concerned, this also is based upon the same alleged breach and the contract is alleged in practically the same language (transcript, page 11).

The fourth cause of action is also based upon the same alleged contract on behalf of the Company not to order the plaintiff to begin work, etc., and the same reasoning, therefore, will apply with equal force to the error contained in assignment of error numbered X wherein the court refused to direct a verdict for the defendant upon the fourth alleged breach of contract and cause of action.

We submit that this also applies to assignment of error numbered VII, but possibly it is not so clear in regard to this assignment. The defendant requested a directed verdict upon the first cause of action. This cause of action was based upon a claim that the steel was not completely fabricated. It may be that parol evidence was properly admitted to show in what condition as to fabrication the steel should be when delivered. This was the view of the trial court. We have said that the parties to this controversy occupied as between themselves the position of quasi-joint contractors inasmuch as the bid which the Company made to the Railway included furnishing the materials and doing the work which the Company itself was to do, and also furnishing materials and doing the work which Poole-Dean was to do and that the compensation when

paid by the Railway Company was to be divided in such manner that Poole-Dean should receive $18.00 per ton for its part of the materials furnished and work done, and the Railway Company the balance for materials furnished and work done by it. The plans and specifications were referred to in the correspondence between the parties and are confessedly applicable to the contract between the Railway and the Company. This was recognized by the trial court in its charge (transcript, page 360), and this also was recognized as applicable to what is termed the sub-contract or the contract between the parties to this controversy in the further charge of the court on the same and following page. Possibly, therefore, what is meant by structural steel or steel for the buildings contemplated by this contract may be the subject-matter of inquiry by parol evidence. It was admitted practically by the defendants that the term *steel* (*structural steel*) as used in this contract means that the steel would be fabricated and shipped in the manner customary for this class of work, considering the manner or the means adopted for its transportation. Poole in his letter of September 11, 1914 (transcript, pages 90-91) claims that this bill for $3330.69 was for work done in the field which it was customary to have done in the shop. In the same letter he states that when he made his proposal he was advised by Mr. Overmire that the material would be fabricated and shipped in the manner customary for this class of work, and he claims that it is customary to ship

material of this character mostly riveted together. What he terms field assembling or riveting he claims is ordinarily done in the shops. The answer of the defendant alleges (transcript, page 20) that the understanding was that the steel should be delivered by water transportation and should be delivered as completely fabricated as it was the defendant's custom to ship by water transportation similar steel for similar work, and that the steel was fabricated to this extent. Possibly, therefore, under the issues made by the pleadings parol evidence as to the degree of fabrication of steel intended for work of this character may have been proper, and therefore it may be that the court was warranted in not directing a verdict for the defendant upon this cause of action.

But this, while possibly true as to the first cause of action, cannot be claimed to be true as to the second, third or fourth causes of action, for the second cause of action is based upon the alleged breach of a parol contract which if made is conclusively presumed to have been included in the written contract, and the third cause of action in like manner is based upon a like claim, and so with the fourth cause of action. Upon this alleged contract no parol evidence was admissible. In this connection it seemingly is claimed, and upon this claim some reliance seems to have been placed by the trial court, that these matters were discussed between Overmire and Poole after Poole-Dean entered upon the contract, and that these matters were discussed between these

parties at and before the contract was reduced to writing. Poole claims that he told Overmire that he would hold his company responsible for these damages. He alleges in his complaint that Overmire agreed that the Company would pay it, but that is not the contract upon which he is suing, and if these statements were made they cannot affect the rights of the parties. As said in the case of *Pitcairn v. Hiss, supra*, what passed between these parties should be "regarded as mere assurances of the intention and ability to please, much as the salesman commends without warranting the excellence of his wares."

THE PLEADINGS.

In this connection your Honors' attention is called to the issues presented by the pleadings. From the amended complaint (transcript, pages 5 and following, paragraph III) it is seen that the first cause of action is based upon the contract under which Poole-Dean agrees to furnish the labor and equipment and to erect, rivet and paint the structural steel to be used in the machine shop, boiler shop, power house and other buildings of the Grand Trunk Pacific at Prince Rupert, B. C., such steel to be delivered by the Company upon the premises of the Grand Trunk Pacific at Prince Rupert, B. C. It is further alleged that the steel should be delivered completely fabricated at the factory, and that if extra work was necessary other than the erection of the steel the plaintiff would be

allowed a reasonable amount for such extra work. It will be noted that nothing is said in the proposal and acceptance as to the extent to which the steel should be fabricated, and nothing is said in regard to extra work or to payment for such extra work. In the first cause of action Poole-Dean does not complain that the steel was not delivered where it should be under the contract; does not complain of any delays, but only complains of extra work required to erect the steel because the steel was not, as it claims, completely fabricated. But this complaint does not apply to the steel for the dry dock, but to the steel for the machine shop, boiler shop, cold storage building, power house and foundry building (paragraph VI, p. 7). The question before the court then was not whether the steel was delivered when and where it should be delivered, but whether when delivered it was in the form in which it should have been delivered, and *this question is confined entirely to the steel for these buildings*, cold storage, ship shed, blacksmith, machine and boiler shop, power house and foundry building, and *has nothing to do with the steel for the dry dock*, which it is admitted was delivered completely fabricated.

The second cause of action (transcript, pages 8 and following) is for damages for delays due to the fact that the pontoons for the dry dock were not delivered at the time that the work upon the other buildings was completed. *It is admitted that*

the steel was delivered in time. It is claimed that it was understood and agreed that the plaintiff should not be ordered to begin work on the job until such time as plaintiff could, when starting the building, continuously keep at work until the completion of the job, and that defendant would reimburse the plaintiff for any delays if there were any delays. Turning to the proposal and acceptance, it will be seen that there is no mention made of delays, no mention made of the time when Poole-Dean should be ordered to go to work, no provision in regard to furnishing the pontoons, and nothing indeed which bears at all upon this cause of action. This cause of action is based entirely upon delays resulting from the failure of the Grand Trunk Pacific to furnish the pontoons at the time when Poole-Dean expected them to be furnished. It is admitted by Mr. Poole (transcript, page 101) that "the *only delay for which he sought to recover was the delay in building the dry dock*" and, on page 85, that he "*understood that the Railway were to build the pontoons themselves*" and not the Company, and that the Railway and not the Company was to furnish the pontoons for the dry dock and, on page 87, that he "*found out about the pontoons by examining the specifications.*" The proposal and acceptance do not state anything about the pontoons but do refer to the specifications. The specifications provide that the pontoons should be furnished by the Railway, not by the Company. The proposal and acceptance do not contain anything in

regard to when the work was to be begun and when completed. *This is governed by the specifications.* The proposal and acceptance contain no provision for delays caused by the failure of the Railway to do its part of the work, and the Railway, it is conceded, had to build the foundations for all the buildings before the erection of the steel could begin, and had to build the pontoons for the dry dock before the steel wings of the dry dock could be erected. *None of these obligations rested upon the Company,—they were all obligations of the Railway.*

The third cause of action (transcript, pages 10 and following) is not really a separate cause of action at all. It is really a part of the second cause of action, merely another element of damage. In the so-called second cause of action the damages are for the enforced idleness of the plant. In the so-called third cause of action the damages are for the transportation of men to and from Vancouver, men whom Poole-Dean had provided for the purpose of doing the work on the wings of the dry dock, but the cause of being unable to employ these men is identical with the cause of the idleness of the plant. These two causes of action, which are really one, have nothing whatever to do with any of the buildings, but relate only to the dry dock. The breach which caused the delay was the breach on the part of the Railway Company. That this was an obligation of the Railway Company and not of

the defendant company is shown by the specifications.

The fourth cause of action is for the *expense of assorting and handling the structural steel for the dry dock*, not for the other buildings. It is claimed in this cause of action that the Company should furnish Poole-Dean with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company (transcript, page 14). The alleged breach on the part of the Company is that it failed to provide such adequate space for this purpose. The proposal and acceptance provide where the steel shall be delivered, but make no mention of space. It is conceded that the steel was delivered at the place agreed on.

The fifth cause of action is for extra work. This, therefore, does not rest upon the contract in writing at all and will be discussed by itself.

The specifications do not state when the work should begin. There was no written contract between the Company and the Railway. The specifications, however, do request bidders to state the time required for the fabrication and delivery of the material at Prince Rupert, the time required to erect the wings on the first section of three pontoons, the time required to erect the wings on the second section of six pontoons and the time required to erect the wings on the third section of

three pontoons (transcript, page 210). The specifications also request similar information in regard to the ship building shed, the power station and other buildings. Attention is also called to the provisions of the specifications (transcript, pages 224-5), which requires the contractor (Poole-Dean Company in this case) to have at all times sufficient number of men on the work who shall act promptly in conjunction with the workmen of all of the contractors in order that there may be no delay in the erection and completion of the work, and to the provision on pages 205-6 in regard to the time when the wings of the dry dock should be erected.

THE EVIDENCE.

We are of the opinion that what we have said in regard to the contract is really a sufficient presentation of the issues in this case, but under the rules of the court we deem it our duty to more particularly apply the evidence to the issues, keeping in mind always the contract between the parties. In this matter we shall discuss the several causes of action in their order, but shall not attempt to reproduce at length the evidence contained in the record.

CAUSE OF ACTION No. I.

The first cause of action is based upon the theory that the contract between the parties required the Company to deliver the steel completely fabricated, and the contention is that the steel was not so fabri-

cated inasmuch as many parts which Poole-Dean expected to be riveted together came "knocked down." The allegation of the complaint is (transcript, page 7) that the understanding was that the steel for the buildings should be delivered completely fabricated, and that if extra work was necessary other than for the erection of said steel, plaintiff would be allowed a reasonable amount for such extra work. This allegation is in conflict with the terms of the written contract inasmuch as the written contract required Poole-Dean not only to erect but also to haul and *rirct* the steel (Defendant's Exhibits 2 and 3, transcript, pages 92 and 93). This leads us to consider Defendant's Exhibit 1, the subject-matter of assignment of error I (transcript, page 37). This exhibit (transcript, pages 90-91) is a letter from Poole-Dean to the Company dated September 11, 1914, in which Poole-Dean forwards bills for extra field work amounting to $3330.69, due (as stated) to being compelled to perform work in the field which it is customary to have done in the shop. In this letter Poole-Dean claims that when it made its proposal it was advised by Overmire that all the "material would be fabricated and shipped in the manner customary for this class of work," not that the steel should come or be delivered completely fabricated. It is not claimed in this letter that Overmire promised that the steel should be completely fabricated. The clear intent of this letter is that Overmire represented that the material would be fabricated and shipped in the

manner customary for this class of work. Poole-Dean, therefore, must either rely upon the contract alleged in the complaint, that the steel should be delivered completely fabricated, or it must rely upon the representations made by Overmire, that the material would be fabricated in the manner customary for this class of work. Under the allegations of the complaint this letter would be incompetent as it does not tend to sustain the allegations of the complaint but tends to contradict such allegations. In this letter Poole-Dean says, "our proposal was to erect, *rivet* and paint this work, which proposal was accepted by you." There was no mention of any field assembling or riveting which is ordinarily done in the shops. This confirms the view which we took of this contract, and the word "*rivet*" clearly must have some significance. The word "*erect*" doubtless would embrace such construction as was necessary to put the materials together substantially and in the manner provided by the plans and specifications. To erect a stone building, for example, would certainly include the use of mortar or cement, as the specifications might provide for holding the stone in place, and the word "erect" would unquestionably include the *riveting* which the specifications showed was necessary to hold the parts of the building together. The word "*rivet*," therefore, has some other significance in this connection, and the only significance which could be given to it is that it meant that whatever the specifications showed was necessary in the way

of riveting should be done by Poole-Dean. It will be noted, furthermore, that in this same letter there is no pretense that Overmire agreed that he would pay for this. The claim is that Poole-Dean stated that it would do the work, keep accurate charge of it and bill the Company for it as soon as it was completed.

Assignments of error VI and VII also relate to this cause of action, though VI relates to all of the causes of action. Assignment of error XII also relates to this cause of action as well as to the other causes of action. Assignment of error XIV relates entirely to this cause of action and so does assignment of error XV. The Company contended upon the trial that the steel was fabricated in the manner in which such steel is ordinarily fabricated for work of this character when shipment is made by water. It contended that this was all that Mr. Overmire said to Poole in regard to the matter, and it contends that inasmuch as the District Court refused to construe the writings passing between the parties (Exhibits "A," 1, 2 and 3) and to charge the jury that these papers comprised the entire contract the court should have submitted to the jury not only the Company's construction of the contract but also the Company's contention as to the extent to which the steel should be fabricated, and that all the evidence in regard to a promise on the part of the Company made by Overmire that the steel should be completely fabricated was in-

competent as in conflict with the written terms of the contract set forth in the letters of Poole-Dean itself. We have said that there may be some question in regard to the meaning of the terms "structural steel" and "steel," and that possibly parol evidence might have been used to show what these terms meant, and in connection therewith this letter might have been introduced. We do not believe this is the law, but as the ruling of the court in regard to the written contract was upon the trial in the District Court the law of the case the defendant had a right to show what was meant by these terms. In this connection your Honors' attention is called to the charge of the court (transcript, pages 361-2) wherein, after reading to the letter of November 7, 1913, and the letter of November 11, 1913, Exhibits 2 and 3 (transcript, pages 92 and 93), the court states that "these letters are a part of the contract but do not include the whole contract which it is alleged the parties entered into between themselves. If the court should so conclude it would be the duty of the court to construe the contract and not for you." Now these letters clearly are complete in so far as they go and they show what the "proposals" were, what the "understanding" was, and they therefore must be construed to include the entire contract, but if they do not they certainly show that Poole-Dean was to *erect* and *rivet* the material and that the material was to be delivered to Poole-Dean on the dock at the building site.

CAUSES OF ACTION No. II and No. III.

The second cause of action alleges the same contract which the first cause of action alleges. The difference is that in the first cause of action the allegation is that the steel shall be delivered completely fabricated and in the second cause of action that it was understood and agreed that the defendant would not order plaintiff to begin work on the job until such time as the plaintiff could, when starting the building, continuously keep at the work until the completion of the job, and that in the event there were any delays in said work the defendant would reimburse the plaintiff for such delays. This second cause of action is for damages for the enforced idleness of the equipment of Poole-Dean owing to delays caused by the failure of the Railway to furnish the pontoons.

In the third cause of action the complaint states exactly the same contract, and the only difference is that the damages claimed are for moneys expended in railway expenses and wages of men returned to Vancouver and back to the work.

It will be seen that Exhibits 2 and 3 say nothing in regard to this matter. It is admitted by Poole-Dean (transcript, page 100) that the only delay was the delay in building the dry dock. It is admitted by him that he learned that the Railway should furnish the pontoons from the specifications (transcript, page 87) and, on page 88, *that he heard the*

specifications read. The specifications do not say when the work shall be commenced or when it shall be completed. The specifications (transcript, pages 205-6) do provide that the time of the erection of the material for the dry dock (and these two causes of action relate only to the dry dock) is to commence when the three first pontoons have been delivered, that the additional three pontoons will be delivered after the erection of the wings on the first three pontoons has been completed, and so on, and declare particularly that the pontoons will be turned over by the pontoon contractors. We have said that the instrument, Exhibit 2, was intended to show what was Poole-Dean's proposal and what was Poole-Dean's understanding, and was intended to state all of the proposal made by Poole-Dean on the main buildings and the wings of the dry dock and all of its understanding with the Company regarding what it was to do upon these buildings, and that the purpose of this letter was "to have its understanding confirmed so that Poole-Dean's records might be complete." In like manner the answer of the Company on November 11th refers to the letter of the 7th and confirms the understanding of Poole-Dean in regard thereto. It would seem, therefore, that there can be no question that these two instruments contained all of the understanding had between the parties in regard to this work, and there is no question that the proposal was intended to show all that Poole-Dean were to do and to indicate all that the Company was to do

upon this joint enterprise. The assignments of error relating to this matter are numbered V (transcript, page 38), VI (transcript, page 39), VIII and IX (transcript, page 40) and XII (transcript, page 42), XIII (transcript, page 44), XV (transcript, page 45), XIX (transcript, page 49) and XX (transcript, page 50). In connection with this matter your Honors' attention is called to Exhibit "G" (transcript, page 68) wherein the Company advises Poole-Dean when shipments would probably be made and when completed and when the material would probably arrive, and to Plaintiff's Exhibit "H" (transcript, page 70) containing like information and warning the plaintiff to "get in touch with Mr. Pillsbury to ascertain the condition of the site and the anticipated progress," and to Defendant's Exhibit 4 (transcript, page 102), and to Defendant's Exhibit 5 (transcript, page 103), and Defendant's Exhibit 6 (transcript, page 105), and to Plaintiff's Exhibit "M" (transcript, page 106). These instruments and the evidence of Poole above referred to clearly show that Poole understood that this work should not begin until the Railway Company or the pontoon contractors had complied with its or their part of the job and furnished the pontoons in the way called for by the specifications. It will be also noticed that on the 10th of November, 1915, according to Plaintiff's Exhibit "I" (transcript, page 75) in which Poole-Dean makes complaint of the extra expense of handling and rehandling the steel for the other

buildings no complaint is made that there was any unexpected delay in regard to furnishing the pontoons. On the contrary, seemingly Poole-Dean claimed credit for "rushing the work upon the other buildings so as to finish the same five weeks ahead of time," thus, according to Poole's own statement, anticipating the completion of the work upon the other buildings and causing the very delay and the very damages of which Poole-Dean now complains. It must be borne in mind that the delays complained of relate only to the dry dock. Five weeks of this delay, according to Poole's own statement, was caused by himself in that he "employed extra men to rush the job upon the other buildings and finish those buildings five weeks ahead of time." Here in the language of Mr. Poole himself and when he was in a complaining mood, he shows that more than half of this alleged delay was caused by his own unwarranted action, and yet he seeks to hold the defendant liable for the loss sustained by reason thereof, and in this same letter in which he is complaining of unfair treatment on the part of the Company he does not even refer to any claim for damages on account of this alleged delay. This whole matter is evidently trumped up. Upon its face it shows that more than half of the damage was caused by the folly of Poole-Dean in rushing to finish work five weeks before the time contemplated for the same.

CAUSE OF ACTION No. IV.

This cause of action is based also upon the alleged contract, stated in practically the same language in which the contract is alleged in the preceding causes of action. The damages are predicated upon this contract, but the particular allegation upon which the same are based is that it was understood and agreed that the defendant would furnish the plaintiff with adequate space for the purpose of assorting and handling the structural steel when it was unloaded on the dock of the Grand Trunk Pacific Company (transcript, page 14). This cause of action is covered by assignments I, II, III, IV, V, VI, IX, X, XII, XVI and XX. Assignment I relates to Exhibit "I" (transcript, page 75). From this exhibit it seems that in submitting a bid Poole-Dean included in its estimate the estimated cost of assorting and handling. Assignment II relates to Exhibit "L" (transcript, page 82), but what reference this has to assorting and handling we have failed to understand. There seems to have been some question between the parties whether the material should be received at the ship's tackles or whether the term "on the dock" meant that the materials should be landed on the dock and received when landed. *There is no question, however, between the parties that the material was delivered as agreed*, and if Poole-Dean was entitled to any extra pay for receiving material at the ship's tackles this unquestionably has been settled and adjusted

between the parties. Assignment III relates to a question propounded to the witness Dean, in which he was asked whether in submitting its bid Poole-Dean did not include a charge for handling and assorting the steel and if so what sum was included in this estimate. Assignment IV also refers to this estimate included in the proposal. If Poole-Dean is entitled to anything on account of this item it is not what he estimated it would cost but what was the reasonable expense of the same. We shall not dwell upon this question for it seems axiomatic that if Poole-Dean was to *haul and erect the steel* which was to be *delivered* to it *on the dock* then Poole-Dean assumed every contingency which was incident to the hauling of the steel from the place of delivery to the place where it should be erected in the buildings. Yet the word "haul" is used in the acceptance of the proposal, or rather in the letter confirming the understanding which Poole-Dean had of its own proposal and the place of delivery, is particularly mentioned both in the letter of Poole-Dean of November 7th and in the letter of confirmation from the Company of November 11th. Whether these letters embrace the entire contract or not these letters unquestionably do embrace the place of the delivery of the steel and the hauling of the steel, and this unquestionably must include the sorting and handling of the steel. If anything was said by Overmire it would only be a representation of what he understood would be the conditions, but as Poole was present at the time that all the repre-

sentations were made and as he knew the representations made by the Railway and knew the sources of Overmire's knowledge, he cannot predicate any claim against the Company on this account.

CAUSE OF ACTION No. V.

This cause of action rests upon a new contract and the assignments of error relating to this matter are numbered VI, XII, XVII and XVIII.

The only other cause of action is the matter of $400.70, admitted to be for the work not contemplated by the contract between the parties. This was extra work not mentioned in the specifications or plans and for which the Railway receiving the benefit must pay. It matters not whether the work was done under the direction of the defendant or under the direction of the Railway Company. It was primarily done under the direction of the Railway and could not be done otherwise. This is conceded. Poole-Dean Company undertook to hold the defendant for these bills. The defendant claimed that Poole-Dean Company should charge these sums to the Railway. It is conceded that this work was not embraced in the original contract. Poole testifies (page 78) that he had an understanding with Overmire that when any work of this kind should come up the plaintiff should go ahead and do it and it should be threshed out afterwards. That he billed the defendant for this work and afterward agreed to bill this work to the Grand Trunk

but in doing so would not release the defendant, but when the defendant paid him he would turn the money over to the defendant. Dean testifies (pages 127-128) that this was extra work not called for by the contract, that when this work was started the defendant had no representative on the ground and that the first of the work done was done under orders from Pillsbury and not under orders from the defendant. Pillsbury in his deposition attaches copies of the bills rendered to the Grand Trunk Pacific Railway for this work. The bills show that the work was done by Poole-Dean Company, contractors, that the bill was for extra work and the same was made out directly to the Grand Trunk Pacific Railway. He testifies (page 183) that they were approved and forwarded by him to the Railway for payment, that it was customary to pay estimates for the Poole-Dean Company on account of labor involved in extra work on bills in favor of Poole-Dean, not of the defendant. The letter transmitting these bills to Donnelly is also found attached to the deposition of Pillsbury.

Defendant contends:

1. That this work was done not for the defendant but for the Railway and that the custom which prevailed, as testified to by Mr. Pillsbury, clearly shows this fact as well as the bills themselves which were transmitted by Pillsbury.

2. That even if the defendant be liable to the

plaintiff the Railway was primarily liable either to the plaintiff or to the defendant.

3. That if the plaintiff, at the defendant's request, billed this claim directly to the Railway this constituted an assignment to the plaintiff of all defendant's claim against the Railway for this work, and the acceptance of this claim by the Railway when so presented by the plaintiff was an acceptance of the assignment.

4. That it is immaterial whether the plaintiff agreed to release the defendant from this claim or not, for if the defendant were liable it is admitted that the Railway Company was liable originally to the defendant for the same and the presentment of the claim in the name of the plaintiff to the Railway, its acceptance and allowance by the Railway placed the plaintiff in any event in the position of a pledgee or mortgagee of this claim, or as the holder of this claim as collateral security, and the plaintiff thereby incurred the obligation of using due diligence to collect it.

5. That when the claim was allowed by the Railway Company in favor of the plaintiff the Railway Company thereby was discharged from any liability therefor to the defendant.

6. That when the Railway gave plaintiff credit for the amount of this claim on the indebtedness of the plaintiff to the Railway, admitted to be in excess of the amount of this claim, this action on

the part of the Railway Company constituted a payment of the claim and the application of the proceeds thereof to the plaintiff's credit, so that the plaintiff has received so much money for this claim, and by reason thereof the defendant is absolved from any liability for the same.

Whatever be the effect of these proceedings it must be conceded that the presentation of the claim to the Railway Company by the plaintiff in its own name constituted a claim against the Railway Company for the amount. It must be conceded that when the claim was allowed by the Railway Company the Railway Company thereby became indebted to the plaintiff under any circumstances for the amount of this claim. Especially is this true as it appears from the evidence that claims of this character were usually presented directly to the Railway Company by the plaintiff. The allowance of the claim, therefore, and the crediting of the same upon the indebtedness of the plaintiff to the Railway Company constituted a payment. Unquestionably the effect of these proceedings is to destroy any claim which the defendant might have against the Railway Company for the amount of these bills, and under such circumstances the plaintiff should be compelled to give credit to the defendant for such amount as so much money paid.

The plaintiff in error respectfully submits that there was error as alleged and that this cause should be reversed.

Respectfully submitted,

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